

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SIMON RAMIREZ,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 1:15-CV-03035-JTR

ORDER GRANTING, IN PART,
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 14, 17. Attorney D. James Tree represents Simon Ramirez (Plaintiff); Special Assistant United States Attorney Erin F. Highland represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on July 12, 2011, alleging disability since July 1, 2008, due to bilateral knee pain, knee injury, arthritis, bursitis in the right elbow,

1 bleeding ulcers, and gastroesophageal reflux disease (GERD). Tr. 217-230, 263,
2 267. The applications were denied initially and upon reconsideration. Tr. 126-
3 134, 137-150. Administrative Law Judge (ALJ) Virginia M. Robinson held a
4 hearing on August 14, 2013, at which Plaintiff, represented by counsel, and
5 vocational expert, Trevor Duncan, testified. Tr. 42-71. The ALJ issued an
6 unfavorable decision on September 13, 2013. Tr. 23-36. The Appeals Council
7 denied review on January 2, 2015. Tr. 1-7. The ALJ's September 13, 2013,
8 decision became the final decision of the Commissioner, which is appealable to the
9 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
10 review on February 26, 2015. ECF No. 1, 4.

11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in the administrative hearing transcript, the
13 ALJ's decision, and the briefs of the parties. They are only briefly summarized
14 here.

15 Plaintiff was 43 years old at the alleged date of onset. Tr. 217. Plaintiff
16 completed his GED in 1986. Tr. 268. Plaintiff has past work as a cook, material
17 handler, salesperson, and fast food manager. Tr. 66, 283-293. Plaintiff reported
18 that he stopped working on July 1, 2008, because of his condition. Tr. 267.

19 Upon the initial denial and reconsideration denial, Tara McBride, Single
20 Decisionmaker¹ and Eugene Kester, M.D., found Plaintiff was limited to
21

22 ¹A Single Decisionmaker Model is a disability determination prototype that
23 was being tested in the State of Washington at the time of Plaintiff's initial and
24 reconsideration determinations. *See* POMS DI 12015.100. A Single
25 Decisionmaker is separate from a medical consultant (MC) or a psychological
26 consultant (PC) and has the authority to complete all disability determination forms
27 and make initial disability determinations in many cases without a MC or a PC. *Id.*
28 In an unpublished decision, the Ninth Circuit has held that it is error for an ALJ to

1 occasionally lifting and carrying twenty pounds, frequently lifting and carrying ten
2 pounds, sanding/walking a total of two hours, and sitting a total of six hours. Tr.
3 78, 87, 102, 117. Disability adjudicators, Ms. McBride and Laurie Baltutat
4 characterized the maximum sustained work capability as sedentary. Tr. 81, 90,
5 107, 122.

6 On April 11, 2011, Fady Sabry, M.D., opined Plaintiff could stand for two
7 hours in an eight-hour work day, sit for five hours in an eight-hour work day, lift
8 twenty pounds occasionally, and lift ten pounds frequently. Tr. 319. On
9 December 16, 2011, Jesse McClelland, M.D., completed a psychological
10 consultative examination. Dr. McClelland reviewed medical clinic notes, a copy
11 of Form SSA 3441, and a copy of the SSA Function Report and completed a
12 Mental Status Examination. Tr. 448, 450-451. Dr. McClelland diagnosed Plaintiff
13 with Attention deficit, hyperactive disorder (ADHD), posttraumatic stress disorder
14 (PTSD), and a rule out diagnosis of major depressive disorder. Tr. 451. Dr.
15 McClelland opined that Plaintiff should not manage his own funds, he should be
16 able to perform simple and repetitive tasks, he should be able to perform detailed
17 and complex tasks, he should be able to accept instructions from supervisors, he
18 should be able to perform work activities on a consistent bases without special or
19 additional instruction, he would likely struggle with interacting with coworkers and
20 the public, he would likely have difficulty maintaining regular attendance in the
21 workplace, he may have interruptions to the normal workday from panic attacks,
22 and he may struggle to deal with the usual stress encountered in the workplace. Tr.
23 451-452. On March 16, 2013, Brent Packer, M.D., a Department of Social and
24 Health Services (DSHS) evaluator reviewed records form Orthopedics Northwest
25 and opined that Plaintiff's rating of sedentary work was supported by the records.

26 _____
27 accord substantial weight to the opinion of a non-physician Single Decisionmaker.
28 *Morgan v. Colvin*, 531 F. App'x 793 (9th Cir. June 21, 2013).

Tr. 550.

STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo, deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that physical or mental impairments

1 prevent him from engaging in his previous occupations. 20 C.F.R. §§
2 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the
3 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that
4 (1) the claimant can make an adjustment to other work, and (2) specific jobs exist
5 in the national economy which the claimant can perform. *Batson v. Comm’r of*
6 *Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If claimants cannot make an
7 adjustment to other work in the national economy, a finding of “disabled” is made.
8 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

9 ADMINISTRATIVE DECISION

10 On September 13, 2013, the ALJ issued a decision finding Plaintiff was not
11 disabled as defined in the Social Security Act.

12 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
13 activity since July 1, 2008, the alleged date of onset. Tr. 25.

14 At step two, the ALJ determined Plaintiff had the following severe
15 impairments: reconstructive surgery of a weight-bearing joint, osteoarthritis, and
16 anxiety disorder. Tr. 25.

17 At step three, the ALJ found Plaintiff did not have an impairment or
18 combination of impairments that met or medically equaled the severity of one of
19 the listed impairments. Tr. 26-28.

20 At step four, the ALJ assessed Plaintiff’s residual function capacity (RFC)
21 and determined he could perform a range of light work:

22 [E]xcept he can occasionally lift twenty pounds and can frequently lift
23 ten pounds. He can stand and/or walk for two hours in an eight-hour
24 workday with normal and customary breaks. He can sit for six hours
25 in an eight-hour workday with normal and customary breaks. He can
26 occasionally operate foot controls. He can occasionally climb ramps
27 and stairs. He can never climb ladders, ropes, or scaffolds. He can
28 frequently balance and stoop. He can occasionally crouch. He can
never kneel or crawl. He is limited to jobs that can be performed while
using a hand-held assistive device for uneven terrain or prolonged

1 ambulation. He should avoid concentrated exposure to extreme cold,
2 excessive vibration, and workplace hazards such as dangerous
3 machinery and unprotected heights. He is limited to relatively simple
4 work, and well learned tasks with only superficial contact with the
public.

5 Tr. 28. The ALJ concluded that Plaintiff was not able to perform his past relevant
6 work, which included the occupations of cook, material handler, salesperson
7 (hardware), and fast food manager. Tr. 34.

8 At step five, the ALJ determined that, considering Plaintiff's age, education,
9 work experience and RFC, and based on the testimony of the vocational expert,
10 there were other jobs that exist in significant numbers in the national economy
11 Plaintiff could perform, including the jobs of assembler, cashier II, and ticket taker.
12 Tr. 35. The ALJ thus concluded Plaintiff was not under a disability within the
13 meaning of the Social Security Act at any time from July 1, 2008, the alleged date
14 of onset, through the date of the ALJ's decision, September 13, 2013. *Id.*

15 ISSUES

16 The question presented is whether substantial evidence supports the ALJ's
17 decision denying benefits and, if so, whether that decision is based on proper legal
18 standards. Plaintiff contends the ALJ erred by (1) failing to properly consider
19 Plaintiff's testimony about the severity of his symptoms; (2) failing to consider
20 Plaintiff's ability to ambulate effectively under Listings 1.02 and 1.03; (3) failing
21 to accord proper weight to the opinions of Dr. Sabry, State Agency Reviewers, and
22 Dr. McClelland; and (4) failing to consider Plaintiff's use of assistance devices in
23 the residual functional capacity determination.

24 DISCUSSION

25 A. Credibility

26 Plaintiff contests the ALJ's adverse credibility determination in this case.
27 ECF No. 14 at 16-21.

28 It is generally the province of the ALJ to make credibility determinations,

1 *Andrews*, 53 F.3d at 1039, but the ALJ’s findings must be supported by specific
 2 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
 3 affirmative evidence of malingering, the ALJ’s reasons for rejecting the claimant’s
 4 testimony must be “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d
 5 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
 6 “General findings are insufficient: rather the ALJ must identify what testimony is
 7 not credible and what evidence undermines the claimant’s complaints.” *Lester*, 81
 8 F.3d at 834.

9 The ALJ found Plaintiff not fully credible concerning the intensity,
 10 persistence, and limiting effects of his symptoms. Tr. 29. The ALJ reasoned that
 11 Plaintiff was less than fully credible because his symptom reporting was (1)
 12 inconsistent with his activities of daily living; (2) inconsistent with the medical
 13 evidence; (3) inconsistent with the lack of medical treatment; (4) inconsistent with
 14 his work activity; and (5) undermined by his criminal history.

15 **1. Activities of Daily Living**

16 The ALJ’s first reason for finding Plaintiff less than credible, that Plaintiff’s
 17 ability to accomplish his daily activities “indicates that he is likely capable of
 18 sustaining some sort of employment within appropriate limitations,” Tr. 29, is not a
 19 specific, clear and convincing reason to undermine Plaintiff’s credibility.

20 A claimant’s daily activities may support an adverse credibility finding if (1)
 21 the claimant’s activities contradict his other testimony, or (2) “the claimant is able
 22 to spend a substantial part of his day engaged in pursuits involving performance of
 23 physical functions that are transferable to a work setting.” *Orn v. Astrue*, 495 F.3d
 24 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).
 25 “The ALJ must make ‘specific findings relating to [the daily] activities’ and their
 26 transferability to conclude that a claimant’s daily activities warrant an adverse
 27 credibility determination.” *Id.* (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th
 28 Cir. 2005)). A claimant need not be “utterly incapacitated” to be eligible for

1 benefits. *Fair*, 885 F.2d at 603.

2 The ALJ noted Plaintiff reported being able to tend to his personal care and
3 grooming without reminders, prepare his own meals, wash dishes, vacuum, dust,
4 water plants, shop for groceries, use public transportation, attend church, read
5 novels, and play cards. Tr. 29. The ALJ found:

6 In short, the claimant is able to tend to his daily needs without
7 assistance. He engages in some physically exertional tasks such as
8 cooking, housework, yard work, and grocery shopping. He is also able
9 to leave his house regularly. The claimant's ability to accomplish all
10 of these daily activities without substantial assistance indicates that he
11 is likely capable of sustaining some sort of employment within
appropriate limitations.

12 *Id.* Here, the ALJ's determinations that these skills transfer to full time work is not
13 specific enough under *Orn*. The activities described by the ALJ are typical home
14 activities. "[M]any home activities are not easily transferable to what may be the
15 more grueling environment of the workplace, where it might be impossible to
16 periodically rest or take medication." *Fair*, 885 F.2d at 603. As such, this is not a
17 specific, clear and convincing reason to find Plaintiff less than fully credible.

18 **2. Medical Evidence**

19 The ALJ's second reason for finding Plaintiff less than credible, that
20 Plaintiff's symptoms are not supported by objective medical evidence, Tr. 30-31, is
21 not a specific, clear, and convincing reason to undermine Plaintiff's credibility.

22 Although it cannot serve as the sole ground for rejecting a claimant's
23 credibility, objective medical evidence is a "relevant factor in determining the
24 severity of the claimant's pain and its disabling effects." *Rollins v. Massanari*, 261
25 F.3d 853, 857 (9th Cir. 2001).

26 First, the ALJ concluded that despite Plaintiff's extensive history of left knee
27 surgeries and reported pain, he reported to Ismael Vargas, PA-C, that he did not
28 require an assistance device to get around. Tr. 30. This is not an accurate

1 reflection of the record. PA-C Vargas stated “[h]e does not use a cane.” Tr. 395.
2 PA-C Vargas then instructs Plaintiff to begin using an assistance device while
3 ambulating. Tr. 398. There is a difference between Plaintiff stating he does not
4 need a cane and Plaintiff stating he does not use a cane. As such, this does not
5 support the unfavorable credibility determination.

6 Second, the ALJ summarized Plaintiff’s testimony, summarized Plaintiff’s
7 physical medical records and found that “the physical medical records do not
8 support the degree of limitation that the claimant is alleging. Though the records
9 show that the claimant does have some problems pertaining to his left knee, he is
10 still able to accomplish his daily activities, and can get around as needed.” Tr. 31.
11 This determination does not meet the specificity requirements set forth in *Lester*.
12 81 F.3d at 834 (“General findings are insufficient: rather the ALJ must identify
13 what testimony is not credible and what evidence undermines the claimant’s
14 complaints.”). Considering the majority of the ALJ’s other reasons for finding
15 Plaintiff less than fully credible are not legally sufficient, even if the physical
16 records do not support Plaintiff’s alleged severity of symptoms, this reason alone is
17 not sufficient to support the ALJ’s determination.

18 **3. Lack of Treatment**

19 The ALJ finds that Plaintiff’s lack of treatment regarding his knee from mid-
20 2011 through 2012, and his lack of treatment regarding his mental health
21 impairments, undermine Plaintiff’s credibility. Tr. 30-31. Noncompliance with
22 medical care or unexplained or inadequately explained reasons for failing to seek
23 medical treatment casts doubt on a claimant’s subjective complaints. 20 C.F.R. §§
24 404.1530, 416.930; *Fair*, 885 F.2d at 603; *Macri v. Chater*, 93 F.3d 540, 544 (9th
25 Cir. 1996) (finding the ALJ’s decision to reject the claimant’s subjective pain
26 testimony was supported by the fact that claimant was not taking pain medication).
27 Social Security Ruling 96-7p states that:

28 [T]he adjudicator must not draw any inferences about an individual’s

1 symptoms and their functional effects from a failure to seek or pursue
2 regular medical treatment without first considering any explanations
3 that the individual may provide, or other information in the case
4 record, that may explain infrequent or irregular medical visits or
failure to seek medical treatment.

5 *See also Orn*, 495 F.3d at 638 (the ALJ erred by failing to discuss the claimant's
6 testimony that he could not afford treatment and finding that lack of treatment
7 supported an unfavorable credibility determination).

8 In her decision, the ALJ fails to address any reason Plaintiff did not seek
9 medical treatment. Tr. 30-31. The Court recognizes that S.S.R. 96-7p states that
10 an adjudicator "may need to recontact the individual" to determine whether there
11 are good reasons the claimant did not seek medical treatment, but does not view
12 S.S.R. 96-7p as creating an affirmative duty on the ALJ to ask such a question
13 when the Plaintiff did not provide a reason or the case record did not support a
14 reason as to why a claimant failed to seek treatment.

15 Here, there is evidence in the record that Plaintiff had limited financial
16 means. Tr. 449 (Dr. McClelland stated "[t]he claimant currently lives in Yakima,
17 Washington, with his mother and gets no financial support"); Tr. 319-320, 535-
18 540, 545-550, (DSHS evaluations showing that Plaintiff was applying for state
19 assistance). Thus, the ALJ was required to consider this evidence prior to
20 determining that Plaintiff's lack of treatment supported an unfavorable credibility
21 determination. If the ALJ viewed the evidence as inadequate or ambiguous, then
22 the ALJ's duty to develop the record under *Mayes v. Massanari* would have been
23 triggered and the ALJ would then be required to recontact Plaintiff to clarify. *See*
24 276 F.3d 453, 459-460 (9th Cir. 2001). Since the ALJ failed to address any reason
25 Plaintiff did not seek medical treatment, this is not a specific, clear and convincing
26 reason to find Plaintiff less than fully credible.

27 **4. Work Activity**

28 The ALJ found that Plaintiff's work from May to June of 2010 showed that

1 he was not as physically limited as alleged. Tr. 32.

2 Plaintiff reported to George S. Liu, M.D., that he had tried to work from
3 May through June of 2010 performing maintenance on irrigation systems, but he
4 had to stop work due to his knee. Tr. 431. On Plaintiff's Work History Report, he
5 reported working from May through June of 2010 performing general maintenance
6 repair, completing work repair orders, and completing lawn maintenance. Tr. 283,
7 292. He stated the work required walking for five hours, standing for seven hours,
8 and lifting fifty pounds frequently. Tr. 292. The ALJ determined that if Plaintiff's
9 impairments were "as limiting as he is now suggesting, it would stand to reason
10 that he would not have performed such exertionally challenging work." Tr. 32.
11 Defendant cites *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir.
12 2009) as asserting that a claimant's employment and seeking work while allegedly
13 disabled are proper grounds for discounting the claimant's testimony. ECF No. 17
14 at 17. In *Bray*, the claimant had been working for two years and continued to look
15 for work after her job ended. *Id.* This is in contrast to Plaintiff who attempted
16 working for two months and had to stop due to knee pain. Tr. 431. The two cases
17 are not analogues, and the ALJ's determination is not supported by established
18 law. The Ninth Circuit has held that the fact that a claimant "tried to work for a
19 short period of time and, because of his impairments, failed," should not be used to
20 discredit the claimant. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-1039 (9th Cir.
21 2007). In fact, evidence that a claimant tried to work and failed may support the
22 claimant's allegations of disabling pain. *Id.* at 1038. As such, this reason does not
23 support the ALJ's unfavorable credibility determination.

24 **5. Criminal Activities**

25 The ALJ found that Plaintiff's various criminal activities detract from his
26 overall credibility. Tr. 32. The ALJ noted that Plaintiff was convicted of a felony
27 sexual assault charge, admitted to using methamphetamine and marijuana,
28 admitted to abusing prescription medication, spent time in jail for various minor

1 offenses, and was arrested for shoplifting. *Id.*

2 An ALJ may use “ordinary techniques of credibility evaluation” in assessing
3 a claimant’s credibility. *Smolen*, 80 F.3d at 1284; see also *Hardisty v. Astrue*, 592
4 F.3d 1072, 1080 (9th Cir. 2010) (in ruling on an Equal Access to Justice Act
5 request, the Court determined the ALJ’s credibility determination was substantially
6 justified when it was based, among other factors, on the claimant’s prior criminal
7 convictions); see also *Carter v. Astrue*, 472 F. App’x 550, 552 (2012 WL 937988)
8 (a claimant’s prior conviction for welfare fraud “casts doubt on [his] motivation to
9 truthfully report”); see also *Albidrez v. Astrue*, 504 F. Supp. 2d 814, 822 (C.D. Cal.
10 2007) (the ALJ may consider a claimant’s reputation for truthfulness, including
11 any convictions for crimes involving dishonesty or moral turpitude).

12 Dr. McClelland reported that Plaintiff “has been arrested once for
13 shoplifting, but also spent time in prison between 2004 and 2009. We did not
14 discuss what caused him to go to prison.” Tr. 449. At the hearing, Plaintiff
15 testified that he spent time in prison for “a statutory sexual assault.” Tr. 50. He
16 further testified that he spent some time in jail for fines, but never had any
17 incarcerations related to drugs. Tr. 50-51. He further testified that the positive
18 drug test in the record showing the presences of methamphetamines and marijuana
19 represented a onetime use where Plaintiff “was in the wrong place at the wrong
20 time.” Tr. 58-59.

21 As for the sexual assault, Plaintiff argues that the crime of assault is not a
22 crime of moral turpitude and cites to *Albidrez*, as support. ECF No. 18 at 9. The
23 Court in *Albidrez*, held that “mere assault convictions are not a proper basis for the
24 ALJ’s adverse credibility finding.” 504 F. Supp. 2d at 822. Here Plaintiff was not
25 convicted of a mere assault, he testified that he was convicted of a statutory sexual
26 assault. Tr. 50. The Ninth Circuit has held that the generic definition of “moral
27 turpitude” are crimes that involve either fraud or “base, vile, and depraved”
28 conduct that “shock[s] the public conscience.” *Nunez v. Holder*, 594 F.3d 1124,

1 1131 (9th Cir. 2010); *See also Coats v. Colvin*, No. 1:14-CV-00712-JLT, 2015 WL
2 5813333, at 17 (E.D. Cal. Sept. 30, 2015) (lewd acts on a minor were held to be a
3 crime of moral turpitude and acceptable to support an unfavorable credibility
4 determination). Here, considering the assault was sexual in nature, it falls under
5 the umbrella of crime of moral turpitude and can be considered a specific, clear
6 and convincing reason to find Plaintiff less than fully credible.

7 Next, the ALJ's reliance on Plaintiff history of drug use and jail time for
8 unspecified offences is not sufficient to support an unfavorable credibility
9 determination. While an ALJ may properly consider evidence of a claimant's
10 substance use in assessing credibility, the Ninth Circuit has generally held that a
11 Plaintiff's inconsistent statements regarding drug use supports an unfavorable
12 decision. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002) (ALJ's finding
13 that claimant was not a reliable historian regarding drug and alcohol usage
14 supports negative credibility determination); *Verduzco v. Apfel*, 188 F.3d 1087,
15 1090 (9th Cir. 1999) (conflicting or inconsistent testimony concerning alcohol or
16 drug use can contribute to an adverse credibility finding). Here, the ALJ did not
17 find Plaintiff's statements regarding his drug use were inconsistent, but simply
18 found that based on Plaintiff's history of engaging in the criminal activity of using
19 drugs, he was not credible. As such, this is not sufficient to support an unfavorable
20 credibility determination.

21 Finally, an arrest without evidence of a conviction is not enough to support
22 an unfavorable credibility determine. In *Hardisty*, the Ninth Circuit specifically
23 found it was reasonable to base an adverse credibility finding around criminal
24 *convictions*, not merely arrests. 592 F.3d at 1080.

25 As such, the ALJ's reliance on Plaintiff's conviction for statutory sexual
26 assault is a clear and convincing reason to support an adverse credibility
27 determination, but her reliance on Plaintiff's drug use and arrest for shoplifting is
28 not.

1 Considering the ALJ's numerous errors in the credibility determination, this
 2 case must be remanded for a new hearing. At such a hearing, the ALJ will make a
 3 new credibility determination.

4 **B. The Ability to Ambulate Effectively**

5 Plaintiff asserts that the ALJ failed to properly consider listings 1.02 and
 6 1.03 because the ALJ did not properly address Plaintiff's ability to ambulate
 7 effectively. ECF No. 14 at 6-8. Conditions contained in the "Listing of
 8 Impairments" are considered so severe that they are irrefutably presumed disabling
 9 without any specific finding as to a claimant's ability to perform his past relevant
 10 work or any other jobs. 20 C.F.R. §§ 404.1520(d), 416.920(d). A claimant is
 11 conclusively disabled if his condition either meets or equals a listed impairment.
 12 *Id.* A claimant must show more than a mere diagnosis of a listed impairment; he
 13 must show that he has a "medically determinable" impairment or impairments that
 14 satisfy all of the criteria in the applicable listing. 20 C.F.R. §§ 404.1525(d);
 15 416.925(d); *Key v. Heckler*, 754 F.2d 1545, 1549-1550 (9th Cir. 1985).

16 Listing 1.02, titled "Major dysfunction of a joint(s) (due to any cause)" is
 17 met by showing the following:

18 [A] gross anatomical deformity (e.g., subluxation, contracture, bony or
 19 fibrous ankylosis, instability) and chronic joint pain and stiffness with
 20 signs of limitation of motion or other abnormal motion of the affected
 21 joint(s), and findings on appropriate medically acceptable imaging of
 22 joint space narrowing, bony destruction, or ankylosis of the affected
 joint(s). With:

23 A. Involvement of one major peripheral weight-bearing joint (i.e., hip,
 24 knee, or ankle), resulting in inability to ambulate effectively, as defined
 25 in 1.00B2b.

26 20 C.F.R. Pt. 404, Subpt. P, App. 1. Similarly, Listing 1.03 is met by showing
 27 claimant underwent "[r]econstructive surgery or surgical arthrodesis of a major
 28 weight-bearing joint, with inability to ambulate effectively, as defined in 1.00B2b,

1 and return to effective ambulation did not occur, or is not expected to occur, within
2 12 months of onset.” *Id.* The inability to ambulate effectively is defined as:

3 [A]n extreme limitation of the ability to walk; *i.e.*, an impairment(s)
4 that interferes very seriously with the individual’s ability to
5 independently initiate, sustain, or complete activities. Ineffective
6 ambulation is defined generally as having insufficient lower extremity
7 functioning (see 1.00J) to permit independent ambulation without the
8 use of a hand-held assistive device(s) that limits the functioning of both
9 upper extremities.

10 (2) To ambulate effectively, individuals must be capable of sustaining
11 a reasonable walking pace over a sufficient distance to be able to carry
12 out activities of daily living. They must have the ability to travel
13 without companion assistance to and from a place of employment or
14 school. Therefore, examples of ineffective ambulation include, but are
15 not limited to, the inability to walk without the use of a walker, two
16 crutches or two canes, the inability to walk a block at a reasonable pace
17 on rough or uneven surfaces, the inability to use standard public
18 transportation, the inability to carry out routine ambulatory activities,
19 such as shopping and banking, and the inability to climb a few steps at
20 a reasonable pace with the use of a single hand rail. The ability to walk
21 independently about one’s home without the use of assistive devices
22 does not, in and of itself, constitute effective ambulation

23 *Id.*

24 The Ninth Circuit has held that “in determining whether a claimant equals a
25 listing under step three of the Secretary’s disability evaluation process, the ALJ
26 must explain adequately his evaluation of alternative tests and the combined effects
27 of the impairments.” *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir.1990). A mere
28 statement that a claimant does not equal the listing is insufficient. *See Id.*

29 In *Marcia*, for example, the claimant identified evidence to establish
30 equivalency of his impairments or a combination of his impairments to a particular
31 listed impairment. 900 F.2d at 176. The ALJ made the following finding as to
32 equivalence: “The claimant has failed to provide evidence of medically
33 determinable impairments that meet or equal the Listings to Subpart P of

1 Regulation 4 or the duration of the requirements Act.” *Id.* at 176. The Ninth
2 Circuit found this explanation insufficient and remanded the matter to the
3 Secretary for proper consideration of step three evidence. *Id.*

4 Here, the ALJ set forth the requirements of Listing 1.02 and then concluded
5 that “the evidence does not demonstrate that the claimant has the degree of
6 difficulty in ambulating as defined in 1.00B2b.” Tr. 26-27. The ALJ cited no
7 medical authority to support her conclusion. There was no discussion on how
8 Plaintiff’s alleged knee impairment failed to meet or equal either of the listed
9 impairments. Additionally, the ALJ failed to consider Listing 1.03.

10 Defendant contends that the ALJ discussed Plaintiff’s ability to ambulate
11 effectively at length later in the decision when she discussed Plaintiff’s activities of
12 daily living. ECF No. 17 at 5. While the ALJ did address Plaintiff’s ability to
13 clean his home, grocery shop, and use public transportation, she did not address
14 Plaintiff’s ability to ambulate effectively. Tr. 29. The Code of Federal
15 Regulations does use the inability to grocery shop and use public transportation as
16 examples of ineffective ambulation. It also states that this is not an exhaustive list
17 of examples of ineffective ambulation. 20 C.F.R. Pt. 404, Subpt. P, App. 1. As
18 such, the ALJ must specifically address the ability to ambulate effectively on
19 remand.

20 **C. Evaluation of Medical Evidence**

21 Plaintiff argues the ALJ failed to properly consider and weigh the medical
22 opinions expressed by Fady Sabry, M.D., and other state agency opinions
23 regarding Plaintiff’s physical limitations and the opinion expressed by Jesse
24 McClelland, M.D., regarding Plaintiff’s mental limitations. ECF No. 14 at 8-16.

25 In weighing medical source opinions, the ALJ should distinguish between
26 three different types of physicians: (1) treating physicians, who actually treat the
27 claimant; (2) examining physicians, who examine but do not treat the claimant;
28 and, (3) nonexamining physicians who neither treat nor examine the claimant.

1 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a
2 treating physician than to the opinion of an examining physician. *Orn*, 495 F.3d at
3 631. The ALJ should give more weight to the opinion of an examining physician
4 than to the opinion of a nonexamining physician. *Id.*

5 When a treating physician's opinion is not contradicted by another
6 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
7 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
8 physician's opinion is contradicted by another physician, the ALJ is only required
9 to provide "specific and legitimate reasons" for rejecting the opinion of the first
10 physician. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when
11 an examining physician's opinion is not contradicted by another physician, the
12 ALJ may reject the opinion only for "clear and convincing" reasons. *Lester*, 81
13 F.2d at 830. When an examining physician's opinion is contradicted by another
14 physician, the ALJ is only required to provide "specific and legitimate reasons" for
15 rejecting the opinion of the examining physician. *Id.* at 830-831.

16 **1. Fady Sabry, M.D.**

17 On April 11, 2011, Dr. Sabry opined Plaintiff could stand for two hours in
18 an eight-hour work day, sit for five hours in an eight-hour work day, lift twenty
19 pounds occasionally, and lift ten pounds frequently. Tr. 319. Prior to providing
20 his opinion, Dr. Sabry examined Plaintiff and stated he would review the May 19,
21 2010, MRI of Plaintiff's knee. Tr. 399-400, 424. The ALJ gave great weight to
22 Dr. Sabry's opinion that Plaintiff could stand for two hours in an eight-hour
23 workday, lift twenty pounds occasionally, and lift ten pounds frequently, but gave
24 less weight to his opinion that Plaintiff could sit for only five hours in an eight-
25 hour workday. Tr. 32. The ALJ found that Dr. Sabry gave no explanation for this
26 degree of limitation and it appeared inconsistent with Plaintiff's physical
27 evaluations and activities of daily living. *Id.*

28 The Ninth Circuit has found that in order to meet the specific and legitimate

1 standard “[t]he ALJ must do more than offer [her] conclusions. [She] must set
2 forth [her] own interpretations and explain why they, rather than the doctors’, are
3 correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir. 1988). Here, the ALJ
4 simply concluded that Dr. Sabry’s opinion was inconsistent with physical
5 evaluations and activities of daily living. The ALJ did not set forth her own
6 interpretations and an explanation as to why her opinion, rather than Dr. Sabry’s,
7 was correct. As such, the ALJ failed to give legally sufficient reasons for the
8 weight given to Dr. Sabry’s opinion that Plaintiff could sit for only five hours in an
9 eight-hour workday. The ALJ is to address the weight given to Dr. Sabry’s
10 opinion on remand.

11 **2. State Agency Reviewers**

12 Plaintiff asserts that the ALJ failed erred in limiting Plaintiff to light work
13 when the other State Agency reviewers limited Plaintiff to sedentary work. ECF
14 No. 14 at 10-12.

15 On March 16, 2013, Dr. Packer reviewed records from Orthopedics
16 Northwest and limited Plaintiff to sedentary work. Tr. 550. The ALJ gave some
17 weight to Dr. Packer’s opinion, finding that he had already made an
18 accommodation for Plaintiff’s knees in the residual functional capacity
19 determination. Tr. 33. Considering the ALJ is to readdress Plaintiff’s credibility on
20 remand and a new credibility determination may result in a new residual functional
21 capacity determination, the ALJ is instructed to readdress the weight given to Dr.
22 Packer’s if a new residual functional capacity determination is necessary.

23 Plaintiff also asserts that residual functional capacity determinations
24 performed upon Plaintiff’s initial application and reconsideration limited Plaintiff
25 to sedentary work. ECF No. 14 at 11. But a review of these opinions show that
26 they match the ALJ’s residual functional capacity determination in lifting,
27 carrying, standing, walking, and sitting. Tr. 78, 87, 102, 117. Therefore,
28 Plaintiff’s assertion that the ALJ erred in limiting Plaintiff to light work instead of

1 sedentary work is without merit. The opinions at the initial denial and
2 reconsideration based the limitation to sedentary work on standing/walking and
3 sitting limitations in their narrative residual functional capacity determinations,
4 while the ALJ based the limitation to light work on the lifting/carrying limitations
5 in her narrative residual functional capacity determination. The narrative residual
6 functional capacity determinations are the same on these exertional limitations.

7 **3. Jesse McClelland, M.D.**

8 Plaintiff challenges the weight given to Dr. McClelland's December 16,
9 2011, evaluation. ECF No. 14 at 13-16. The ALJ gave Dr. McClelland's opinion
10 little weight because the doctor relied on Plaintiff's undiagnosed impairment of
11 attention deficit hyperactivity disorder (ADHD), the doctor relied on Plaintiff's
12 self-reports, and the findings are inconsistent with mental status exam. Tr. 33.
13 Once again, because the ALJ is instructed to readdress credibility upon remand and
14 the ALJ rejected Dr. McClelland's opinion based on the doctor's reliance on
15 Plaintiff's testimony, the ALJ is to readdress the weight given to Dr. McClelland's
16 opinion upon remand if a new residual functional capacity determination is
17 necessary.

18 **D. Use of Assistance Devices**

19 Plaintiff argues that the ALJ failed to fully account for Plaintiff's use of
20 assistance devices. ECF No. 14 at 12-13. Because the ALJ is already directed to
21 readdress the ability to ambulate effectively upon remand, the ALJ is also
22 instructed to address Plaintiff's use of assistance devices in a new residual
23 functional capacity determination if a step four determination is necessary.

24 **REMEDY**

25 The decision whether to remand for further proceedings or reverse and
26 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
27 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
28 where "no useful purpose would be served by further administrative proceedings,

or where the record has been thoroughly developed,” *Varney v. Secretary of Health & Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014) (noting that a district court may abuse its discretion not to remand for benefits when all of these conditions are met). This policy is based on the “need to expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find a claimant disabled if all the evidence were properly evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

In this case, it is not clear from the record that the ALJ would be required to find Plaintiff disabled if all the evidence were properly evaluated. Further proceedings are necessary for the ALJ to determine Plaintiff’s credibility regarding his symptom reporting and his ability to ambulate effectively. If a new step four determination is necessary, the ALJ is to form a new residual functional capacity determination addressing the medical source opinions and Plaintiff’s use of assistance devices. Furthermore, the ALJ is instructed to elicit testimony from both physical and psychological medical experts and a vocational expert regarding any new step three, four, and five determinations.

CONCLUSION

Accordingly, **IT IS ORDERED:**

1. Defendant’s Motion for Summary Judgment, **ECF No. 17**, is **DENIED**.

2. Plaintiff’s Motion for Summary Judgment, **ECF No. 14**, is **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for additional proceedings consistent with this Order.

1 3. Application for attorney fees may be filed by separate motion.

2 The District Court Executive is directed to file this Order and provide a copy
3 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
4 and the file shall be **CLOSED**.

5 DATED March 1, 2016.





JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE